regulation rules implemented pursuant to Section 623,[221] because those basic cable rates have already been regulated, via agreement, where the cable system that is a party to the agreement was not subject to effective competition under the Commission's regulations in effect when the agreement was concluded.

VIII. LEASED COMMERCIAL ACCESS

The amendments to Section 612 of the Communications Act contained in the 1992 Cable Act are among the most difficult to discern because the statutory goals and objectives are starkly in conflict. There is one very simple explanation for this: the section's policies and objectives have become internally inconsistent and conflicting. The overarching purposes of the section are set forth in Section 612(a): "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public...." To achieve these purposes, the Commission is instructed to establish rules for determining the "maximum reasonable rates that a cable operator may establish" for commercial leased access.[222] The price and other terms and conditions for leased access established by the operator must be "at least sufficient to assure that <u>such use will not adversely affect the operation, financial condition, or market development of the cable system.</u>"[223]

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221 <u>See</u> <u>id.</u>

222 1992 Cable Act § 612(c)(4).

223 <u>Id.</u> § 612(c)(1)(emphasis added); Notice at ¶ 160.

The inherent problems of leased access as a compelled act were expressly recognized by the House Report. It explicitly discussed the Commission's Cable Report and its findings that demand for leased access has been substantially less than that which was anticipated in 1984.[224] The House Committee also noted that some leased access is occurring nevertheless. What prompted the Committee to amend the section was its perception that "leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure or to cable subscribers."[225] More specifically, the Report described the concern that "cable operators have financial incentives to refuse leased access channel capacity to programmers whose services may compete with services already carried on the system, especially when the cable operator has a financial interest in the programming services it carries."[226] Thus, the House Committee concluded that "leased access capacity should be used to promote competition by independent programmers to the services selected by the cable operator."[227]

Congress' concerns were thus clearly articulated. So too was its proposed remedy: to involve the Commission in setting rules for cable operators to establish maximum reasonable rates. This approach is markedly different from the regulatory approach for basic service. The language of Section 612 calls only for a maximum rate, and one that the

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224 House Report at 39.

225 Id.

226 Id.

227 Id. at 40.

cable operator will establish pursuant to Commission rules. Individual negotiation and departure from this maximum rate was expressly envisioned: "The operator and the programmer can bargain for a lower rate."[228]

The approach to amending Section 612 was further explained by the Senate Report:

> The cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use. However, the existing provision does not improve the situation. For a programmer to have any success, the programmer must negotiate many elements.... By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels.[229]

Thus, a minimally intrusive approach was selected to provide some limits -- some "parameters" -- to add more certainty to a process which would, by virtue of added certainty, be facilitated. The available remedies were similarly revamped to permit more ready enforcement.[230]

Notwithstanding Congress' conclusion regarding leased access, it was not based on any empirical factual support. Congress did cite to the Commission's 1990 Cable Report as providing a basis for the view that leased access was not working as intended.[231] However, the

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228 Senate Report at 32 (emphasis added).

229 Id. at 31-32.

230 See, e.g., 1992 Cable Act § 612(c)(4)(A)(iii)(calling for expedited resolution).

231 Despite its specific recommendations herein regarding leased commercial access, Time Warner generally disputes any suggestion that the current leased access mechanism is unworkable. There is simply no evidence that leased commercial access provisions are not "working" with regard to fostering the diversity goal of Section 612. In fact, Time Warner cable (continued...)

Commission noted that it received few comments providing information on leased access. It could only cite the joint comments of New York City and The National League of Cities as supporting the notion that cable operators had "frustrated" leased access use by establishing unreasonable terms. In fact those comments related only three systems' experiences to make out their claim -- one involving a demand that the programmer maintain insurance coverage, and two involving rate card prices without an explanation of any attempt at negotiation or the actual level of leased access use on those systems.[232] However, in years of leased access operation Time Warner has had only two lawsuits against it alleging that it has offered unreasonable prices -- both brought by producers of sexually explicit programming challenging rates for leased access time other producers have agreed to pay.[233]

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[231](...continued) systems offer a wide array of leased access programming. Time Warner's Manhattan cable system carries a host of diverse and niche leased access programming, including "The Calvary Hour" (Sunday morning church service; worship; religious; no commercials and no fundraising); "Galavision" (variety Spanish language program); "Home Shopping Network" (electronic retail programming service offering merchandise for sale to viewers); "Living with AIDS" (educational format dedicated to ending the AIDS crisis); "New York Diary" (adult show which embraces sensuality as the natural, decent, and inevitable aspect of life); "Only in New York" (interview program portraying opinions of all New Yorkers); "TNN" (variety show with music, sports, entertainment, and talk programs). Throughout the country, there is no evidence that would-be programmers have been denied access either.

[232] Comments of City of New York et al. in MM Docket No. 89-600 at ¶¶ 142-44, referred to at ¶ 177 of the 1990 Cable Report.

[233] Media Ranch, Inc. v. Manhattan Cable Television, Inc., 90 Civ. 7218 (S.D.N.Y.) and Gay Cable Network, Inc. v. Manhattan Cable Television, Inc., 91 Civ. 7450 (S.D.N.Y.).

The Commission must be exceptionally cautious in implementing the new provisions of Section 612 because there is much room here to do substantial harm to the cable operator. Such harm would disserve cable companies and cable consumers alike. Dr. Kelley echoes this call to caution in his recommendations regarding an approach to leased access rules:

> Leased access channel rate regulation presents a different set of objectives. If leased access channel capacity is actually being used by a diverse group of programmers, then no rate regulation is necessary because the public interest objectives set by Congress are obviously being met. Where there is no observed demand for leased access capacity, intervention is obviously unnecessary. Maximum rate regulation is required only when there is significant excess capacity and unmet demand for that capacity. In any event, cable operators must be given the flexibility to set prices under any maximum in order to promote usage of these channels.[234]

A. The Commission Should Establish A Maximum Leased Access Rate Based on the Highest Implicit Access Fee Currently Charged on the Cable System

The Notice proposes to fall back to either cost-of-service regulation, cost-based benchmarks, or market rates of effective competition systems to implement this section.[235] In making these various proposals, the Notice suggests an intent to derive a rate for leased access. As discussed, this type of approach far exceeds the scheme intended by Congress. Individual negotiations remain the controlling mechanism: programmers are given at least two additional pieces of "leverage" by the statute. First, there is a ceiling price

[234] Kelley at ii-iii.

[235] Notice at ¶¶ 147-152.

which constrains the operator; second, there are expedited procedures to resolve controversies between operator and programmer.

The Commission should keep in mind that under § 612 the "term 'price' is intended to encompass any commercial arrangement consistent with the section . . . includ[ing] fee per channel, fee per subscriber, profit sharing . . . ."[236] Therefore, the Commission in setting maximum rates should formulate its approach to preserve these options.

Similarly, in franchise areas where demand for leased access time is high, the Commission should exempt from price or term regulation systems that have a policy of leasing time to the programmer offering the highest price for the desired time slot or channel (above the operator's cost). Under such a system, the cable operator cannot be exercising editorial control over the selection of programming on leased access channels -- the primary evil sought to be addressed by section 612.[237]

Moreover, in many systems leased access time is made available, at least on some channels, in one-half hour or hour blocks of time. Not all time is valued at the same level (e.g., prime time and early late night is in much higher demand than midafternoon). Any approach employing cost factors must permit the system to recover a much greater part of the cost (and profit) during the more valuable hours.

In light of the foregoing considerations, the maximum leased access rate established by the Commission needs to meet two objectives:

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[236] 130 Cong. Rec. S.12239 (daily ed. Oct. 11, 1984)(statement of Sen. Wirth).

[237] H.R. Report No. 934, 98th Cong., 2d Sess. 51 (1984)("1984 House Report").

it must be sufficiently low so that it permits commercial opportunities, and further, it must be sufficiently high so that it does not encourage existing programmers to "migrate" to leased access and thereby threaten the economic condition of the cable operator. The problem is recognized in the Notice:

> [I]f rates for leased access are low enough, unaffiliated programmers may seek to move their program offerings from other channels to those set aside for leased access, thereby diminishing the number of channels available for leased access without adding to the diversity of the programming offered on the system.[238]

The problem of migration poses a far greater problem with far more profound consequences than the Commission intimates in the above passage. The problem flows from the fact that existing program services contribute to the overall revenues of the cable operator to very disparate degrees. The most successful cable programming services generate relatively large net revenues for the cable operator, while many others make relatively small contributions to the fixed cost of constructing and operating a cable system. Accordingly, the migration of even a small number of program services to leased access channels could have large adverse effects. Pay services are the most likely to migrate, seeking to market themselves directly to the subscriber rather than selling their programming to cable operators for resale. Similarly, services such as TNT and ESPN, which are usually paid a fee by operators, will consider -- at the right price -- going to leased access and foregoing operator payments to sell their property directly to subscribers.

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[238] Notice at ¶ 161.

The deleterious effects of program migration can only be averted by establishing a maximum leased access fee no lower than the highest implicit access fees that are currently being charged programmers on non-leased access channels. Under any approach, the Commission must be certain that there would be no adverse effects on the financial condition of the cable operator as required by the statute. A "highest implicit access fee" approach minimizes the harmful effects which migration could cause. This approach also affords a straightforward maximum rate setting methodology that reflects true marketplace conditions for a leased channel on a specific cable system. Any ceiling which is lower than this maximum figure could prompt migration and adversely affect the financial condition of cable operators in direct contravention of the statute.[239]

Time Warner agrees with the Commission's view that there should be no requirement that cable operators undertake billing and collection services for the programmers.[240] In systems such as Time Warner's New York system in Manhattan, there are over 35 leased access programmers at any one time.

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[239] The Commission cannot realistically preclude migration by simple fiat. If the monetary incentives created by the new statutory schema are wrong, a programmer will find some way to avoid any direct inhibition on migration, e.g., through name changes, modest format changes, etc. The Commission would then be in the position of having to assess whether a second generation channel was so much like the first generation that it was a migrated channel for § 612 purposes -- a quagmire that certainly should not be knowingly entered.

[240] Notice at ¶ 146. See also 1984 House Report at 52 ("Nothing in this section is intended to require a cable operator to provide marketing, billing, or other services to an unaffiliated third party using a channel designated under this section.").

Time Warner is concerned regarding the Commission's statement that it is considering whether to issue regulations as to tiering and channel positioning of leased access channels.[241] At this juncture, Time Warner simply notes that leased access programming can occupy up to 15% of a system's capacity. To restrict the operator beyond the must carry regulations on tiering decisions is unwarranted. Leased access regulations should not focus on the operator's relationship with the subscriber -- their target is the programmer-operator relationship. Further interfering with channel positioning determinations -- key to the effective packaging and marketing of the system -- cannot be consistent with Congress' concern that leased access requirements not economically burden cable operators.

B. Not-for-Profit Programmers Are Entitled to No Special Leased Access Treatment

The Notice proposes a series of changes to promote additional usage of leased access by not-for-profits programmers.[242] It is difficult to fathom just why or how this issue is being raised. Nothing in either the 1992 Cable Act nor in the 1984 Communications Act authorizes the Commission to establish any special subsidized rate. The 1984 Act's legislative history merely noted that a cable operator may favor select programmers at its discretion, not that a discount for certain classes of programmers is required.[243]

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241 Notice at ¶ 156.

242 Id. at ¶¶ 152-154.

243 See 1984 House Report at 51.

Second, as mentioned above, there is simply no evidence that the leased access provisions are not "working" with regard to Congress' "diversity" goal of Section 612.[244]

Third, the only provisions in the 1992 amendments regarding non-profits relate specifically to certain qualified educational and minority programmers.[245] These provisions are largely self-executing. There is simply no reason to believe that the 1992 amendments were intended to declare open season on valuable cable channels for any 501(c)(3) organization. The subsidy scheme envisioned in the Notice is social policy -- not economic regulation which is the Commission's jurisdictional concern.

Fourth, the Act plainly contemplates that the local franchising authority, through the franchising process, can require the public access channels desired locally. Any subsidies of public, educational, or governmental access which necessarily will increase cable rates to all subscribers are appropriately left in the province of local authorities.

Fifth, there is nothing inherently valuable to having tax-exempt organization status. It is simply a recognition that the organization is not properly taxable with respect to its related income. In the case of religious organizations under 501(c)(3), for example, it is a question certainly not of promoting religious organizations but indeed precisely the opposite, i.e., separation of church and state. Why it is particularly good policy, much less how it can be constitutional, to

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244 See supra, n. 233.

245 1992 Cable Act § 612(i).

coerce cable companies and/or their subscribers to subsidize religious programming over other types is rather unclear at best. To take another example, not all activity undertaken by a 501(c)(3) organization is tax-exempt. An educational organization which earns "unrelated business income" is taxed on that activity. In most cases, the programming revenues which the Notice proposes to subsidize will in fact be taxable.[246] This makes 501(c)(3) utterly unworkable as a test for "deserving" non-profit programming, even if this were an appropriate program for endowing the arts.

Finally, as a simple economic matter, the opportunities for arbitrage between the lower nonprofit rates and the commercial higher rates would render enforcement impossible, and thus reintroduce the problem of migration discussed above, thereby resulting in substantial financial harm to the cable system.

C. Expedited Procedures and Resolution

The Notice understandably seeks reconciliation of the new language to Section 612(c), adding regulatory oversight to cable operators' leased access prices on the one hand, and the presumption of reasonableness and good faith contained in subsection 612(f) on the other. The legislative history gives virtually no guidance on this point. To give effect to both provisions, the Commission must continue to apply the presumption for any rate below the maximum as established. If that were not the case there would be two different standards

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[246] See Iowa State University of Science and Technology v. United States, 500 F.2d 508 (1974)(revenue generated by television station run by college taxable to university as commercial, unrelated trade or business, notwithstanding fact that station run to educate students).

applied predicated solely upon whether the programmer brought its complaint to the federal court under § 612(d) or to the Commission under its regulations. The Notice further questions whether such "emergency" procedures such as oral rulings should be established.[247] It is frankly difficult to conceive of what situations involving leased access programming would require "emergency treatment." We can think of none. Controversies will arise over time, as negotiations which have continued over some period would fail to establish a mutually satisfactory arrangements. Under such typical conditions, however, an expeditious pleading cycle (30 days for opposition; 15 for reply), should be more than adequate. The Commission's obligations under the Administrative Procedure Act should not be sacrificed in this cause, however: all rulings must be in writing.

IX. THE 1992 CABLE ACT AUTHORIZES CABLE OPERATORS TO ITEMIZE ON SUBSCRIBER BILLS ALL GOVERNMENTALLY IMPOSED COSTS

In addition to ensuring the reasonableness of basic service rates, Section 623 of the 1992 Cable Act expressly requires that the Commission adopt procedures to account for such matters as the costs related to PEG access channels,[248] other franchise obligations, and franchise fees. The Act also directs the FCC to account for additional programming costs related to the basic tier, including the direct costs of any networks added to the minimum basic tier and retransmission

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[247] Notice at ¶ 167.

[248] The Commission's rate regulations must include standards to identify such costs. 1992 Cable Act § 623(b)(4).

consent payments.[249] Section 622(c) of the 1992 Cable Act expressly authorizes cable operators to itemize on subscriber bills, in addition to amounts charged for cable services: (1) the amount of the franchise fee (and the identity of the franchising authority), (2) the amounts assessed to satisfy any franchising authority imposed PEG access requirements, and (3) "any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber."[250] In order to implement these related provisions, the Commission seeks comment on the interrelationship between the two Sections.[251]

The legislative history to Section 623(b)(4) indicates that, at least as pertains to basic rates, Congress' goal was "to help keep the rates for basic cable service low."[252] Although there is little other legislative history regarding these provisions, Time Warner believes there are two fundamental reasons why Congress provided for such itemization: (1) to provide fairness to cable operators, allowing them, for example, not to be prejudiced under any benchmark approach by costs that directly result from governmental cost increases, and (2) to facilitate the scrutiny by cable subscribers of all charges on the cable bill, so that the subscribers can be fully informed as to the

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[249] Id. § 623(b)(2)(c). See also id. § 325(b)(3)(A)(Commission required to account for impact of retransmission consent payments on basic rates).

[250] Id. § 622(c).

[251] Notice at ¶ 175.

[252] Conference Report at 63.

charges for cable services, as well as any additional charges such as government taxes, fees, and levies.

One beneficial result of itemizing the foregoing cost categories is that, in accord with Congress' intent, they would not have to be included in determining benchmark rates, thereby promoting the goal of reducing the burdens on franchising authorities, cable operators, and the Commission.[253] Thus, the most efficient way for the Commission to implement Sections 622(c) and 623 in a consistent manner is to allow all of the foregoing costs to be itemized as separate charges over and above the basic rate authorized by the Commission's benchmarks. Consequently, the formula will not have to deal with such costs. Take, for example, two cable operators having systems of similar size, age, location, and configuration. Their basic service rates, which by statute do not include franchise and government related costs, might well be the same applying the applicable benchmarks to be devised by the Commission. However, assume one cable system pays a 5% franchise fee and is subject to other onerous franchise or government related costs while the other is not. Obviously, these two systems should not be grouped together for purposes of establishing benchmark rates, unless only rates for cable services are compared. It makes little sense to bundle service rates and franchise fees (and other government taxes and levies) only to have to delete them afterwards. It is also precluded by statute.

Similarly, take two cable communities served by the same headend, but whose franchising authorities impose differing assessments as in

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[253] <u>See</u> 1992 Cable Act § 623(b)(2)(A).

example 1. Even without regard to whether the 1992 Cable Act's requirement of uniform rate structures[254] might be applied on a system-wide as opposed to a franchise-area basis, the cable operator nevertheless has incentives (including administrative ease in billing and marketing, etc.) to charge the same service rate to all of the system's subscribers. However, it is unfair to certain subscribers to require the same total bill to be charged in each franchise area throughout the system. The result of such a requirement would be that subscribers in communities with lower government costs would be subsidizing those subscribers in communities with higher government costs. If such costs are itemized and kept apart from the benchmark analysis ab initio, however, the cable operator would be able to charge the same service rate throughout the system, each community could judge the rate for purposes of meeting the basic rate benchmark, and subscribers with higher total bills would now know that government assessments on the cable operator account for that differential.

Once the costs and assessments to be itemized are identified, they must be "reasonably and properly" allocated among the various levels of service.[255] Franchise fees, stated as a percentage of service and equipment revenue, are by definition allocable. However, since the basic service level must include both PEG access channels[256] and

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[254] Id. § 623(d).

[255] Id. § 623(b)(2)(C)(v).

[256] See id. § 623(b)(7)(A)(ii)("[s]uch basic service tier shall, at a minimum, consist of the following: (ii) [a]ny public, educational, and governmental access programming required by the franchise to be provided to subscribers.").

stations for which any retransmission fees might have to be paid,[257] the proportionate amount of these charges should be added to the bill of all subscribers who receive basic service.

The Commission must also make clear that the identification on the subscriber bill in the form of a "separate line item" is authorized by the express language of the 1992 Cable Act. The authority to itemize such amounts as a "separate line item" obviously allows more than hiding an explanation in a footnote buried in fine print at the bottom of the bill, as some franchise authorities have demanded.[258] Rather, the ability to disclose by line item means a separate line for each relevant government cost immediately below the cable operator's <u>service</u> rate. Such pass-throughs should be added on below the line to allow the actual basic service rate to be uniform among multiple communities served from the same headend, even if franchise-related costs differ. Only if itemized costs are displayed clearly among the separate

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[257] <u>Id.</u> § 623(b)(7)(A)(i)("[s]uch basic service tier shall, at a minimum, consist of the following: (i) [a]ll signals carried in fulfillment of the [must carry] requirements of sections 614 and 615"). <u>See also</u>, <u>id.</u> § 6 (generally requiring retransmission consent for the carriage of commercial broadcast stations).

[258] The House Report language regarding itemization, while not adopted by the Conference Committee, may have essentially <u>prohibited</u> itemization, in direct contravention of the express statutory language. For example, it would have prohibited the cable operator from itemizing $1.50 allocable to the franchise fee as a separate line item from a $28.50 net service rate on a $30 total cable bill, instead only permitting the cable operator "to include in a <u>legend</u> a statement that the $30 basic cable service rate includes a 5% franchise fee, which amounts to $1.50." House Report at 86 (emphasis added). This contradicts the statute itself and, moreover, would render this provision unconstitutional. <u>See</u> <u>Pacific Gas & Electric v. P.U.C. of California</u>, 475 U.S. 1 (1986).

charges, which are then added to arrive at the total amount due, can Congressional intent be realized for the subscriber to be shown the amount of the "total bill" that such assessments impose. This approach will allow a subscriber to see graphically, line by line, the "bottom line" amount which is billed, as well as whether the cable operator or local government is imposing the various components of the total bill.

As a policy matter, in determining the scope of itemized government costs, the Commission should further Congress' intent to: a) keep the rates for basic cable services "reasonable"[259] and 2) expose and thereby minimize associated government charges. By permitting full disclosure of the latter, Congress plainly believed disclosure would itself restrain the imposition of costs on the cable customer which the cable operator has absolutely no means to control.[260] Specifically, full itemization of the costs described above could provide incentives for franchising authorities to refrain from imposing unreasonable or excessive assessments upon prospective new cable operators or incumbent cable operators seeking franchise renewals. Of course, it will be impossible to achieve Congress' goal of "reasonable" total charges to subscribers in connection with basic cable service if local governments, whose assessments upon cable

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[259] 1992 Cable Act § 623(b)(1).

[260] Conference Report at 63.

operators make up a sizeable portion of the total bill,[261] can prevent full disclosure of new or higher charges.

The Commission has no authority to order local governments to be reasonable in imposing such assessments. The most effective check on local governments is public scrutiny. The public cannot exercise such scrutiny over cable related assessments unless it has the full facts, including the breakdown of the individual charges and amounts that make up cable service bills. The only efficient way to provide such information to the public is by allowing cable operators to itemize such heretofore hidden assessments directly on the bills sent to cable subscribers.

X. THE COMMISSION MUST ADOPT A FLEXIBLE IMPLEMENTATION STRATEGY THAT AFFORDS CABLE OPERATORS AMPLE TIME TO COMPLY WITH THE NEW REGULATORY FRAMEWORK

The 1992 Cable Act presents a number of difficult transitional issues. The fundamental and profound changes envisioned by the Act must not be implemented abruptly as time is needed for cable operators, consumers, the Commission, and local franchising authorities to adjust to these changes. Rather, the Commission should recognize that precipitous changes may cause undesirable consequences for all parties involved and should therefore be flexible in providing cable operators time to make the changes necessary to bring their businesses into compliance with the Commission's new rules.

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[261] In a 1984 study, National Economic Research Associates, Inc. found that franchise requirements (such as franchise fees, community endowments, etc.) add up to $927 to each subscriber's bill over the course of the franchise term. William B. Shew, Costs of Cable Television Franchise Requirements, Feb. 14, 1984, at 14, 20.

Not only is a flexible implementation approach to cable rate regulation fully consistent with Commission precedent,[262] it is wholly warranted by the fundamental alterations the cable industry will undergo as a result of the 1992 Cable Act. Channels will have to be retiered, pricing practices and rate structures overhauled, subscriber bills modified, program delivery systems readjusted. All these changes will require time and a gradual process of assimilation. In addition, there are significant "unknowables" facing cable operators (e.g., which broadcast stations will opt for must carry as opposed to retransmission consent status) that will not be resolved for some time and which will further complicate and delay the realignments cable operators will experience. A flexible implementation approach toward cable rate regulation will go a long way toward assuaging the potentially harsh impacts of this regulation on cable systems, regulatory bodies, and consumers alike.

Finally, this flexible implementation approach is consistent with the statutory scheme. The Act requires the Commission to establish regulations concerning rates for the basic service tier, rates for

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[262] See, e.g., Transport Rate Structure and Pricing, CC Dkt 91-213 (released October 16, 1992)(establishing a three year transition for changes in transport rate structures because Commission could not decide what would be a reasonable rate under a wholly new rate structure); Amendment to Part 69 of Rules, 2 F.C.C. Rcd 6447, 6457 (1987)(adopting a phased in approach because flash-cut changes in separations and access charge rules would produce "hardship for some ratepayers and carriers that can be mitigated by the phased introduction of the new rules."); Second Computer Inquiry, 84 F.C.C. 2d 50, 66 (1980)(recognizing the need "to make adjustments to existing arrangements involving allocations of costs, investment and revenues" and accordingly designing a flexible transition plan for the deregulation of customer premises equipment).

cable programming service, and prevention of evasions within 180 days of enactment.[263] The Commission correctly interprets these sections of the Act as requiring that "regulations ... be in place 180 days from the enactment," but not "that all implementing steps that cable systems must take to meet the obligations of the statute or our rules must be completed on that date."[264] Time Warner fully supports this interpretation and urges the Commission to remain flexible in implementing its new regulatory framework.

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263 1992 Cable Act §§ 623(b)(2),(c)(1),(h).

264 Notice at ¶ 143.

Resume of Daniel Kelley

PROFESSIONAL EXPERIENCE:

Senior Vice President, Hatfield Associates, Boulder Colorado, (current position).

Conducting economic and applied policy analysis of domestic and international telecommunications public policy and business issues.

Director of Regulatory Policy, MCI Communications Corporation, 1984-1990.

Responsible for developing and implementing MCI's public policy positions on issues such as dominant carrier regulation, Open Network Architecture, accounting separations and Bell Operating Company line of business restrictions. Also managed an interdisciplinary group of economists, engineers and lawyers engaged in analyzing AT&T and local telephone company tariffs.

Senior Economist and Project Manager, ICF Incorporated, 1982-1984.

Telecommunications and antitrust projects included: forecasting long distance telephone rates; analysis of the competitive effects of AT&T's long distance rate structures; a study of optimal firm size for cellular radio markets; analysis of the FCC's Financial Interest and Syndication Rules, and competitive analysis of mergers and acquisitions in a variety of industries.

Senior Economist, Federal Communications Commission, 1979-1982.

Served as Special Assistant to the Chairman. Advised the Chairman on proposed regulatory changes in the broadcasting, cable television and telephone industries; analyzed legislation and drafted Congressional testimony. Coordinated Bureau And Office efforts on major common carrier matters such as the Second Computer Inquiry and the Competitive Carrier Rulemaking. Also held Senior Economist positions in the Office of Plans and Policy and the Common Carrier Bureau.

Staff Economist, U.S. Department of Justice, 1972-1979.

Analyzed proposals for restructuring the Bell System as a member of the economic staff of U.S. v. AT&T; investigated the competitive effects of mergers and business practices in a wide variety of industries.

CONCLUSION

For the foregoing reasons, Time Warner respectfully recommends that the Commission adopt rules for the regulation of cable services and equipment consistent with the comments herein.

Respectfully submitted,

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OFFICE OF THE SECRETARY

THE ECONOMICS OF
CABLE TELEVISION REGULATION

Prepared For

Time Warner Entertainment Company, L.P.

By

Daniel Kelley

Hatfield Associates, Inc.

January 27, 1993

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EXECUTIVE SUMMARY

Government intervention in cable television carries with it the potential to do significant harm to an industry that has been performing quite well along a number of significant public policy dimensions. Therefore, the objectives of the 1992 Cable Act must be carefully specified and the least intrusive possible regulatory tools for accomplishing those objectives must be identified. A careful analysis of the goals of the 1992 Cable Act shows that government intervention can be minimized, while still providing consumers with the benefits that Congress intended.

The Commission's analysis of the significant shortcomings of cost-based regulation for the cable industry is correct. Rate of return regulation will impose significant costs. Other less intrusive and less costly forms of intervention will provide equal or even greater benefits. Rate of return or cost-based regulation should only be used as a backstop in limited cases.

The benchmark approach suggested for basic cable rate regulation is appropriate. While none of the specific benchmark approaches suggested by the Commission are likely to be perfect, the results of an appropriate benchmark system will likely lead to prices for basic services that both achieve the broad objectives of the 1992 Cable Act and limit unnecessary government interference in the cable business. Three alternative benchmarks are proposed: adjusted 1986 rates, rates of systems subject to effective competition, and existing average rates.